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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

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10 In re CELLCYTE GENETIC
11 CORPORATION SECURITIES
12 LITIGATION

13
14 This order relates to: All Actions

15 Case No. C08-47RSL

16 ORDER GRANTING MOTION TO
17 DISQUALIFY LANE POWELL PC

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19 **I. INTRODUCTION**

20 This matter comes before the Court on a motion filed by defendant Dr. Ronald
21 Berninger to disqualify Lane Powell PC (“Lane Powell”), counsel for defendant G. Brent
22 Pierce. Dr. Berninger argues that Lane Powell should be disqualified from representing
23 Pierce because the firm also represents two other clients involved in this litigation and in
24 three related matters. Two other defendants, CellCyte Genetics Corporation and Gary
25 Reys, have joined in Dr. Berninger’s motion.

26 **II. ANALYSIS**

27 In January 2005, defendants Dr. Ron Berninger and Gary Reys co-founded
28 CellCyte Washington, a private company dedicated to human stem cell research and

1 development of stem cell therapies. After a reverse merger, CellCyte Genetics
2 Corporation was formed in February 2007.

3 Lane Powell represents Brent Pierce, a defendant in this case accused by investors
4 of engineering a “pump and dump” scheme to artificially inflate the price of CellCyte’s
5 stock. Plaintiffs allege that Pierce has a history of engaging in similar schemes.

6 Lane Powell also represents Leonard Braumberger, a long-time associate of Pierce
7 who worked as a consultant for CellCyte. In addition, Lane Powell represents Dr.
8 Theresa Deisher, the former Vice President of Research and Development for CellCyte.
9 In that role, she participated in research and in presentations to encourage investment in
10 CellCyte. She has filed a civil lawsuit against CellCyte, Dr. Berninger, and others
11 alleging claims arising out of her employment with CellCyte. Specifically, she alleges
12 that CellCyte, Dr. Berninger and Reys induced her to take the job based on false
13 information, and she became a whistle blower once she learned the truth. Dr. Deisher
14 does not allege that Pierce or Braumberger engaged in fraud.

15 The SEC has issued a formal order of investigation relating to CellCyte. Pierce,
16 Braumberger, and Dr. Deisher have all testified before the SEC. The SEC is also
17 investigating Pierce’s role. The U.S. Attorney’s Office for the Western District of
18 Washington has opened a federal criminal investigation involving CellCyte, and Pierce is
19 a target of that investigation. Dr. Deisher is not a defendant in this case. Nor is she a
20 target of the investigations by the SEC or the U.S. Attorney’s Office.

21 All three clients have consulted with independent counsel. All three have stated
22 that after those consultations, they want Lane Powell to continue to represent them.

23 **A. Standing.**

24 Lane Powell argues that Dr. Berninger lacks standing to move to disqualify the

1 firm. It contends that only a current or former client has standing to challenge an
2 attorney's representation of another party. As a court in this district recently noted,
3 “[N]either the United States Supreme Court nor the Ninth Circuit has addressed the
4 particular question of whether the standing doctrine bars a nonclient party from moving to
5 disqualify the opposing party's counsel on the grounds of a conflict of interest.” FMC
6 Technologies, Inc. v. Edwards, 420 F. Supp.2d 1153, 1156 (W.D. Wash. 2006)
7 (considering plaintiff's motion to disqualify defense counsel). The court in FMC
8 Technologies noted that courts may consider non-client initiated disqualification
9 challenges based on the courts' “inherent power to ‘protect the integrity of their
10 processes.’” Id. at 1156 (quoting Colyer v. Smith, 50 F. Supp.2d 966, 970 (C.D. Cal.
11 1999) (describing the ““court's well recognized power to control the conduct of the
12 attorneys practicing before it”” and to ensure the fair administration of justice); see also
13 Trone v. Smith, 621 F.2d 994, 999 (9th Cir. 1980) (stating, in the disqualification context,
14 “The primary responsibility for controlling the conduct of lawyers practicing before the
15 district court rests with that court.”)).

16 In this case, because the motion has merit, as discussed below, the Court has a
17 “plain duty to act.”” FMC Technologies, 420 F. Supp.2d at 1157 (quoting In re Yarn
18 Processing Patent Validity Litig., 530 F.2d 83, 89 (5th Cir. 1976)). It must act to protect
19 the integrity of the process and to protect the litigants. Accordingly, the Court considers
20 Dr. Berninger's motion to disqualify Lane Powell.

21 **B. Conflict of Interest.**

22 The Court considers the possibility that Dr. Berninger has brought this motion as a
23 litigation tactic. Lane Powell argues that the timing of the motion supports that view.
24 However, Dr. Berninger's current counsel raised the conflict issue with Lane Powell
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1 within a week after making their appearance. Previous counsel had also raised the issue
2 with Lane Powell. The evidence does not support a finding that this motion is a tactic.

3 Attorneys practicing before this Court must comply with the Washington Rules of
4 Professional Conduct. General Local Rule 2(e)(2). This matter is governed by
5 Washington Rule of Professional Conduct 1.7, which addresses conflicts of interest
6 involving representation of current clients. Rule 1.7 provides as follows:

7 (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the
representation involves a concurrent conflict of interest. A concurrent conflict of interest
8 exists if:

- 9 (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be
materially limited by the lawyer's responsibilities to another client, a former client or a
10 third person or by a personal interest of the lawyer.

11 (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a),
a lawyer may represent a client if:

- 12 (1) the lawyer reasonably believes that the lawyer will be able to provide
competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client
against another client represented by the lawyer in the same litigation or other proceeding
before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing (following
authorization from the other client to make any required disclosures).

16 RPC 1.7(a)(2) permits an attorney to continue to represent conflicted current
17 clients if "the lawyer reasonably believes that the lawyer will be able to provide
18 competent and diligent representation to each affected client." The "reasonableness"
19 issue includes an objection and subjective component. RPC 1.0(h) & (i).

20 Lane Powell argues that there is no conflict of interest, but even if one exists, it is
21 waivable. Waivability will turn on whether the Lane Powell attorneys reasonably believe
22 that they can provide competent and diligent representation to all three of their clients
23 simultaneously. For purposes of resolving this motion, the Court will not delve into the
24 minutiae of who said what to whom at which meeting. The merits of the various disputes
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1 cannot be resolved in this motion. Rather, the Court will focus on the realities of the
2 representation.

3 Lane Powell contends that no conflict exists, in part because none of its clients is
4 asserting a claim against another client. That factor weighs in favor of finding that the
5 clients' interests are not directly adverse. However, the clients' interests may become
6 directly adverse in the likely event that Lane Powell is required to cross examine its own
7 clients. At the least, Lane Powell's representation of one client will materially limit its
8 representation of another client. Although Dr. Deisher is not a party in this proceeding,
9 she, like Braumberger, is likely to be a witness. Similarly, Pierce and Braumberger are
10 likely witnesses in Dr. Deisher's arbitration. For that reason, Lane Powell will be
11 required to cross examine its own clients in both proceedings. Dr. Deisher has an interest
12 in proving fraud, which, according to plaintiffs in this case, directly involved Pierce and
13 Braumberger. Their role in the alleged fraud is hotly contested. The Court cannot
14 assume that plaintiffs' allegations are baseless and that the SEC and criminal
15 investigations involving Pierce (and potentially Braumberger) lack merit. Therefore, as
16 the facts emerge, there is a probability that Dr. Deisher's interests and those of Pierce and
17 Braumberger could become adverse. See ABA Formal Opinion 92-367 (explaining that
18 direct adverseness occurred when an attorney had to cross examine a client in an
19 unrelated matter); see also Declaration of Arthur Lachman, (Dkt. #110) ("Lachman
20 Decl.") at ¶ 31 ("Based on the facts as they develop in the pending litigation matters, at
21 some point in the future a direct adversity conflict of interest may arise if [Lane Powell]
22 lawyers determine that they must cross-examine one of their clients in the course of
23 representing one of the others").

24 The purpose of the rule against concurrent representation is based "on the duty of
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1 undivided loyalty an attorney owes a client.” Smiley v. Office of Workers Compensation
2 Programs, 984 F.2d 278, 282 (9th Cir. 1993) (explaining that among other things, the rule
3 was designed to prevent “an honest practitioner from having to choose between
4 conflicting duties, or attempting to reconcile conflicting interests rather than enforcing a
5 client’s rights to the fullest extent”). As the ABA opinion explained, “an attorney should
6 not be permitted to put himself in a position where, even unconsciously, he will be
7 tempted to ‘soft pedal’ his zeal in furthering the interests of one client to avoid an
8 obvious clash with those of another.” ABA Formal Opinion 92-367 at p. 3. In this case,
9 there would be an obvious temptation for Lane Powell to “soft pedal” its cross
10 examination of its own clients to further the interest of other clients, or its own interest in
11 continuing the multiple representation. The conflict is even more apparent than in the
12 ABA opinion because the matters are related.

13 Lane Powell and its expert contend that the conflict can be mitigated by bringing
14 in substitute counsel to cross examine its clients if necessary. However, once a trial is
15 underway, bringing in other counsel is no simple matter. Doing so would result in
16 significant delay for everyone involved and possibly increase costs for the clients.
17 Moreover, it would be difficult for new counsel to conduct an effective cross examination
18 without being familiar with the entire case. Some of the clients’ interests would be
19 undermined by having unfamiliar counsel conduct a cross examination rather than
20 experienced counsel. Moreover, it is difficult to imagine how Lane Powell could advise
21 one client about whether to call another of its clients as a witness without disclosing
22 confidences and while maintaining loyalty to all.

23 In fact, the firm has an ethical obligation to share all relevant information learned,
24 regardless of the source or the context, with its clients. Comment [31] to RPC 1.7

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1 explains,

2 [C]ontinued common representation will almost certainly be inadequate if one
3 clients asks the lawyer not to disclose to the other client information relevant to
4 the common representation. This is so because the lawyer has an equal duty of
5 loyalty to each client, and each client has the right to be informed of anything
6 bearing on the representation that might affect that client's interests and the right
7 to expect that the lawyer will use that information to that client's benefit.

8 The criminal investigations, Dr. Deisher's arbitration, and this case all involve the same
9 transactions and underlying facts. This reality makes it very likely that Lane Powell will
10 learn facts that ethically it should, but cannot, share with its other clients. For example, if
11 Lane Powell learned confidential information from representing Pierce and Braumberger
12 before the SEC, it must share that information with Dr. Deisher if it would help her in her
13 arbitration. It is easy to imagine that in their interviews with the SEC, Pierce and
14 Braumberger disclosed information about their roles in the alleged securities fraud that
15 they would want to keep from others, including Dr. Deisher. The duty to share
16 information and of undivided loyalty undermines Lane Powell's argument that the limited
17 scope of its representation avoids a conflict. Reply Declaration of David Boerner, (Dkt.
18 #124) ("Boerner Reply Decl.") at ¶ 5; Reply Declaration of John Strait, (Dkt. #125)
19 ("Strait Reply Decl.") at p. 3.

20 Lane Powell argues that there is no conflict because its clients share a common
21 interest: all three want to show that CellCyte engaged in fraud. Even if the clients'
22 interests are aligned now, the Court cannot assume that they will not diverge later. If a
23 deeper conflict arises later in the proceedings, dealing with it will be much more difficult
24 and disruptive later.

25 Moreover, the perpetuation of a common theory of representation for all three
26 clients is in itself very troubling. It is possible that the duty of loyalty and zealous
representation is undermined by Lane Powell's interest in continued representation and/or

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1 its loyalty to other clients. Strait Reply Decl. at p. 6 (“Key to Mr. Lachman’s declaration
2 and [Lane Powell’s] position is the claim that there is no factual inconsistency between
3 the firm’s various clients. But that claim itself is the product of the very conflict that
4 requires [Lane Powell’s] disqualification”). Even absent any other issues, the Court
5 would find an unwaivable conflict based on the fact that Lane Powell, based on its own
6 interest and the interest of its other clients, could be discouraged from exploring strategies
7 that do not comport with the common theme.

8 Other issues convince the Court that the conflict is not waivable. Lane Powell
9 essentially concedes that it has an unwaivable conflict of interest in representing its
10 clients in the criminal proceedings. However, its duty of loyalty and to communicate
11 with its clients shows that the same conflict exists regardless of whether the context is
12 criminal or civil. Strait Reply Decl. at p. 5 (“In effect, Lane Powell’s duty to
13 communicate with its clients in the matters in which it has not withdrawn generates
14 exactly the same conflicts that would exist if it continued to directly represent these
15 clients in the criminal and SEC investigations in which it concedes it has a non-waivable
16 conflict of interest”). Moreover, the Court must consider whether Lane Powell was able
17 to make the disclosures necessary to obtain informed consent. It may have gained
18 confidential information from one or all three of its clients in the context of this litigation,
19 Dr. Deisher’s arbitration, and/or the SEC investigation. If Lane Powell cannot disclose
20 some of the information it learned from one client to the others, then their consent to the
21 representation was not fully informed. Comment [19] to RPC 1.7. For all of these
22 reasons, the Court finds that Lane Powell has a conflict of interest in the concurrent
23 representation that is not waivable.

24 The Court does not reach this conclusion lightly. Disqualification is a drastic
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1 measure. The Court is loathe to interfere with a party's choice of counsel or with the
2 attorney-client relationship. In this case, the matter is further complicated by the
3 numerous proceedings involved, Dr. Deisher's rapidly-approaching arbitration, and the
4 amount of time and money already poured into the various relationships. The Court
5 weighs those factors against its role in protecting the fairness of the proceedings. In the
6 end, the fairness of the proceedings must prevail.¹

III. CONCLUSION

8 For all of the foregoing reasons, the Court GRANTS Dr. Berninger's motion to
9 disqualify Lane Powell (Dkt. #84). From the date this order is posted, Lane Powell is
10 precluded from representing Pierce, Braumberger or Dr. Deisher in this matter. It must
11 advise Pierce to obtain substitute counsel in this case or provide the Court with *pro se*
12 contact information.

DATED this 20th day of November, 2008.

Mrs Lasnik
Robert S. Lasnik
United States District Judge

²³ ¹ The Court also considered whether a solution less than complete disqualification
24 might be warranted. The parties did not suggest any such remedy, and none seems
available.